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No. 07-1210

In The
Supreme Court of the United States

LLOYD EVANS, Individually and in his official capacity as Superintendent of Rock Hill Local School District,
Petitioner,

v.

SHARA JENKINS, Individually and as legal guardian of Shanell Ratcliff,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

R. GARY WINTERS
Counsel of Record
MCCASLIN, IMBUS & MCCASLIN, LPA
THE PROVIDENT BUILDING
632 VINE STREET, SUITE 900
CINCINNATI, OH 45202-2442
(513) 421-4646

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Whether a parent's criticism of a public school official must be on a matter of public concern for it to be considered speech protected by the First Amendment?

PARTIES TO THE PROCEEDINGS

Petitioner is Lloyd Evans ("Evans"). Respondent is Shara Jenkins ("Jenkins").

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INTRODUCTORY PRAYER

Petitioner respectfully requests that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 17, 2008.

OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Ohio, issued on November 21, 2006, reported at 463 F. Supp. 2d 747, has been included in the appendix on pages 22-46a. The Opinion of the United States Court of Appeals for the Sixth Circuit, issued on January 17, 2008, reported at 513 F.3d 580, has been included in the appendix on pages 1-21a.

BASIS FOR JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on January 17, 2008. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution Amendment I

The First Amendment to the United States Constitution provides in relevant part that, "Congress shall make no law***abridging the freedom of

speech***or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

42 U.S.C.§ 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured***."

STATEMENT OF THE CASE

Jenkins is the mother of Shanell Ratcliff, a minor who attended elementary school in the Rock Hill Local School District (Rock Hill). (App. 23a). Shanell is a diabetic who required medical care during the school day. (*Id.* at 23-24a). Rock Hill nurse Marsha Wagner supervised Shanell's medical care, pursuant to the medical course of treatment prescribed by Shanell's doctor. (*Id.* at 23-25a). Jenkins wanted Wagner to administer insulin to her daughter, despite the fact that Shanell's doctor did not prescribe this course of care. (*Id.* at 25a). Wagner refused to administer insulin without written authorization signed by Shanell's doctor. (*Id.*) None was provided to Wagner or Rock Hill. (*Id.*)

On December 13, 2001, Jenkins' letter to the editor of *The Ironton Tribune* was published by that paper. (App. 38a) In her letter, she accused "the school" of

withdrawing her daughter without permission and treating them "differently" because she is "fighting for [her] daughter's rights." (*Id.*)

On December 19, 2001, an anonymous complaint against Jenkins was made to the Lawrence County Department of Job and Family Services ("Family Services"). (*Id.* at 28a). The caller accused Jenkins of medically neglecting her daughter. (*Id.*) Family Services investigated the complaint. (*Id.* at 39a). Jenkins claims that Evans made the call to Family Services. (*Id.*) Evans denies making a complaint to Family Services. (*Id.*) Jenkins claims that Evans called Family Services in retaliation for her Letter to the Editor and complaints to others. (*Id.* at 38a).

Jenkins filed suit against Petitioner and his employer, defendant Rock Hill Local School District Board of Education ("Board"), claiming "retaliation for her exercise of her First Amendment rights and violation of her and her daughter's First Amendment right to privacy." (*Id.* at 34a)

The district court granted defendants' motion for summary judgment on both claims. (App. 44a). The court ruled that Jenkins' First Amendment retaliation claim failed because her comments did not relate to a matter of public concern and thus were not protected speech. (*Id.* at 39a). The court also ruled that the record could not "sustain a finding that the Defendants violated Jenkins' or her daughter's informational right to privacy." (*Id.* at 41a). Jenkins filed a timely appeal to the Sixth Circuit.

The Sixth Circuit affirmed the district court's grant of summary judgment to Petitioner and the Board on Jenkins' privacy claims. (*Id.* at 21a). It also affirmed the grant of summary judgment to the Board on Jenkins' remaining claims because "there is no respondeat superior liability in actions under §1983, and there is no evidence of a governmental custom or policy [which] led to any adverse action against Plaintiffs." (*Id.* at 15a). The Sixth Circuit found that the district court erred in granting summary judgment to Evans on Jenkins' retaliation claim. (*Id.* at 15a).

The legal issue presented here is one which requires the Court's clarification of First Amendment protected speech. The circuit courts are split over the issue of whether a parent's criticism of a public school official must be on a matter of public concern for it to be considered speech protected by theFirst Amendment. The Court's review of this compelling issue is warranted to resolve the conflicts between the circuit courts and an *intra*-circuit split in the Sixth Circuit.

REASON FOR ALLOWANCE OF THE WRIT

I. FIRST AMENDMENT RETALIATION

A. Review should be granted to resolve the conflict among circuit courts on whether a parent's criticism of a public school official must be on a matter of public concern for it to be considered speech protected by the First Amendment.

The recitation of legal authority in this Petition demonstrates the clear conflict between the circuits

and their lower courts on the definition of protected speech for citizens who are not also employed by governmental entities. Regardless of one's allegiance or approach, this split has revealed several truths. The first is there is a difference of opinion among the circuits. This cannot be denied. The second truth is that what started in the school setting has now moved to the housing and academic arenas. The third truth is that this conflict is on the move, geographically. This split cannot be isolated to the jurisdictions of the Sixth and Seventh Circuits. Lower courts from New York to California have recognized the need to extend *Connick v. Myers*, 461 U.S. 138 (1983) and have done so. Petitioner submits that silence on the definition of protected speech will led to an even greater divide among the circuits.

"Section 1983 is not a source of substantive rights but provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386 (1989) To state a claim under §1983, a plaintiff must prove two elements: (1) that the defendant deprived her of a right secured by the Constitution or laws of the United States; and (2) that in so doing, the defendant acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). This legal authority is not in dispute. The dispute or conflict arises in the context of the elements of a First Amendment retaliation claim.

The three elements of a First Amendment retaliation claim are the following:

> (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the

> defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Mattox v. City of Forest Park, 183 F.3d 515, 520 (6th Cir. 1999).

"The public concern test originated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983), in which the Supreme Court held the First Amendment protects from retaliation governmental employees who speak on matters of public concern." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, *8-9 (6th Cir. 2008). For public employee speech, the first inquiry is "whether the employee spoke as a citizen on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Whether or not the speech addresses a matter of public concern is determined by the content, form and context of a given statement. *Connick, supra* at 147-48.

"If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* at 418. "If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant governmental entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* "Government employers, like private

employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick, supra*, at 143, 103 S. Ct. 1684, 75 L. Ed. 2d 708 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). *Id.* at 418. "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* at 419.

In the context of several governmental employee First Amendment retaliation cases, the Sixth Circuit has ruled that personal complaints or grievances by an employee concerning his treatment do not implicate matters of public concern and do not receive constitutional protection. *See Bullock v. Board of Regents*, 889 F.2d 1086 (6th Cir. 1989); *see also Rowland v. Mad River School Dist.*, 730 F.2d 444 (6th Cir. 1984). Since Jenkins was not an employee of a governmental entity, the issue arises as to whether her speech must address a matter of public concern.

The circuit courts are divided on this issue. The Sixth Circuit and Seventh Circuit have adopted different approaches for examining whether a citizen's speech qualifies as "constitutionally protected activity." To make matters more uncertain, the Sixth Circuit has a split of authority within the Circuit. Moreover, the Second Circuit has ruled in ways consistent with the Seventh Circuit's approach but has not given reasons for its extension of the *Connick* standard. Petitioner submits that his Petition must be granted to resolve the conflict on this vital

interpretation of what is protected First Amendment speech.

In the district court proceeding, Jenkins argued that the *Connick* standard applied only to First Amendment retaliation claims brought by governmental employees. *Jenkins v. Rock Hill Local Sch. Dist.*, 463 F. Supp. 2d 747 (S.D. Ohio 2006) (App. 37a). The district court did not agree. (*Id.*) Instead, it adopted the approach of the Seventh Circuit as expressed in *Landstrom v. Illinois Dept. of Children and Family Services*, 892 F.2d 670 (7th Cir. 1990) and found that "to fall within the protection of the First Amendment, Jenkins' expression must touch upon a public concern". (*Id.*). The district court stated that it "could not conclude that Jenkins has stated a constitutional violation" because her comments "concerned her daughter's specific situation and did not implicate the Defendants' conduct with respect to anyone else." (*Id.* at 39a). For that reason, the district court granted defendants' summary judgment motion on Jenkins' First Amendment retaliation claim. (*Id.*)

Upon appeal, the Sixth Circuit ruled that the public concern standard did not apply to Jenkins' speech. *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580 (6th Cir. 2008) (App. 11a). The court found that "had the district court applied the proper definition of constitutionally protected activity, the Court would have recognized***Jenkins***satisfies the first element of prima facie First Amendment retaliation." (*Id.* at 14a). The court did not agree with the Seventh Circuit's definition of speech. (*Id.* at 13a). It was critical of the Seventh Circuit's agreement with the lower court's analysis without independent discussion

or explanation as to why it agreed. (*Id.* at 12a). It also was critical of the *Landstrom* district court's reliance upon *Pickering* and Connick, because these decisions were public employee cases. (*Id.* at 13a). The court declined to follow the Seventh Circuit's "mistaken analysis" in *Landstrom, supra*. (*Id.*).

In direct conflict with the Seventh Circuit's precedent, the Sixth Circuit held that parental speech about school officials is still constitutionally protected even if it is not about matters of public concern. (*Id.*) Significant to the court was the fact that "Defendants have not pointed to any case from the Supreme Court or this Court that parents criticizing school officials is off-limits when the speech is not about matters of public concern." (*Id.* at 14a). It cited *Bloch, supra*, for the general proposition that "the right to criticize public officials is clearly protected by the First Amendment." (*Id.*)

The court acknowledged that the public concern test has been extended by the Supreme Court beyond the public employment setting to "situations analogous to public employment, where free speech rights must be balanced against the need to effectively manage a governmental entity." (*Id.* at 10a). However, the court refused to add parental speech about school officials to the "limited extensions" to the public-concern test. (*Id.* at 10a). It relied not only on the lack of precedent to make this extension, but also on one of its decisions from 2000, *Gable v. Lewis*, 201 F.3d 769 (6th Cir. 2000). (*Id.* at 11a) It cited *Gable* for the proposition that "the public concern test is not applicable to petitioning activity outside the public employee context." (*Id.*).

The court was not persuaded by defendants' policy argument that "the public concern test is necessary to prevent frequent disputes between parents and school officials from becoming First Amendment lawsuits." (*Id.* at 13a). According to the court, "that purpose is served by the other two elements of a First Amendment retaliation claim.." (*Id.* at 13a).

The Sixth Circuit's reasoning in this case reveals an *intra*-circuit split. In 2002, the court ruled that a citizen's First Amendment retaliation claim must involve expression addressing a matter of public concern. *Jones v. Union County*, 296 F.3d 417 (6th Cir. 2002). The *Jenkins* court was not persuaded by the holding in *Jones* because it relied upon decisions within the public employment context. (*Id.* at 11a).

Jones sued Union County and the Union County Sheriff's Department, claiming that the defendants "violated her federal constitutional rights by having a policy and/or custom of providing less protection to victims of domestic violence than to victims of other crimes, and that gender discrimination was a motivating factor in the Sheriff's Department's failure to serve an *ex parte* order of protection on her ex-husband." *Jones, supra*, at 420. The court found that Jones' "specific request for an order of protection against her ex-husband in this case was 'far more a matter of private interest than public concern.'" *Id.* at 426. The court affirmed the district court's order granting summary judgment to defendants, because there was no genuine issue of material fact about whether Jones was denied court access. *Id.*

The *intra*-circuit conflict in the Sixth Circuit gives way to a larger conflict between the circuit courts. The Seventh Circuit has clearly and unambiguously ruled that the speech of parents to school administrators or board members must satisfy the public-concern test. *Landstrom, supra*. The *Landstrom* court cited to *Connick, supra*, for the above proposition. *Id.* In *Landstrom*, the plaintiffs, parents of a first-grader, complained to school officials about their actions during a child abuse investigation. *Id.* at 671. The school, suspecting that the child (Ashley Landstrom) might have been abused by her parents, took the child to a room where she was examined by a school nurse and various social workers. *Id.* The father called the school principal and complained about this conduct on the part of the school and forbade similar conduct in the future. *Id.* at 672.

Despite this warning from the father, the school conducted other examinations. *Id.* Plaintiffs subsequently filed suit and among their allegations against the school was that it had "'unconstitutionally retaliated against Parents by questioning their children after Parents had instructed Plozay [the principal] to 'cease and desist from further inquiry'." *Id.* at 679. The Seventh Circuit found that the statements "were basically 'we don't approve of your examination of Ashley' and 'don't do it again' . . . Parents' purpose of making these statements was obviously to prevent like examinations of their children in the future, not to 'bring wrongdoing to light'." *Id.* As a result, the court affirmed the district court's dismissal of plaintiff's First Amendment retaliation claim on the grounds that the speech did not relate to a matter of public concern. *Id.* Since the

speech did not constitute a matter of public concern, the court did not find it necessary to address the other elements of First Amendment retaliation. *Id.* at n.11.

The Seventh Circuit adopted the policy considerations of the district court in *Landstrom v. Illinois Dept. of Children and Family Services*, 699 F. Supp. 1270 (N.D. IL 1988)("*Landstrom I*"). The district court examined the *Connick* court's rationale for its public-concern restriction. (Id. at 1279). It recited the following statement from *Connick*: "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* The court went on to analogize the public school setting to the public employment setting with the following: "What is thus surely true in the employment situation – and what this Court holds true as to Parents as well – is that the distinction between speech as to personal interests and speech as to public concerns must be preserved. If a private complaint about a public actor's wrongdoings were automatically converted into "a matter of public concern" for First Amendment purposes simply because (1) the actor was a public person and (2) the conduct was wrongful, the first step in Connick would be rendered totally meaningless – by definition there could never be any First-Amendment-unprotected activity." *Id.*

The court expressed the danger of recognizing the personal claims of the plaintiff/parents as protected

speech. "Where Parents fail here, however, is in trying to bootstrap their 'Don't do it again' statements made to Plozay and Harris alone, followed by defendants 'doing it again,' into a claim charging First-Amendment-violative conduct by defendants. If Parents have a substantive claim arising out of defendants' conduct itself being unconstitutional***, so be it. But Parents' Count II claim, to paraphrase *Connick,* 461 U.S. at 139, is not one of 'the most unusual circumstances' in which 'a federal court is***the appropriate forum in which to review the wisdom of [the] decision taken by [the] public agency allegedly in reaction to [Parents'] behavior.'" *Id.* The court ruled that the parents' speech involving "purely personal complaints" could not support their First Amendment claim. *Id.* at 1280.

Seven years after its decision in *Landstrom I*, the United States District Court for the Northern District of Illinois revisited the same scenario in *Mnyofu v. Bd. of Educ.*, No. 03C8717, 2005 U.S. Dist. LEXIS 26640 (N.D. IL Nov. 1, 2005). Parent Mnyofu alleged that school officials "violated his First Amendment rights by retaliating, and conspiring to retaliate against him for speaking out on Board employees' unauthorized contact with his son and on various Board policies." *Id.* at *14. The court examined Mnyofu's expression under the *Connick* standard. *Id.* at *15. The court determined that this speech did not relate to a matter of public concern because his purpose was "to resolve a personal complaint." *Id.* As a result, the court ruled that this speech could not support a First Amendment claim. *Id.*

Adoption of the *Landstrom* rationale has extended beyond the jurisdiction of the Seventh Circuit. District courts in California, Texas, New York and Ohio have cited to this decision in the school setting and beyond.

In *Clark v. West Contra Unified Sch. Dist.*, No. C-98-4884, 2000 U.S. Dist. LEXIS 3990 (N.D. CA March 15, 2000), the District Court for the Northern District of California heard a case alleging First Amendment retaliation by the mother of a public school student. The speech in question involved the mother's attempt to obtain a particular result for her daughter the next time her daughter went on an educational field trip. *Id.* at *26. The court recognized that the litigants before it offered "no reason why parents who voice a personal grievance should have a different standard applied to them". *Id.* at *25. Similar to Jenkins, the plaintiffs in *Clark* had contended that *the Connick* standard only applied to the public employment context. *Id.* at *24. The court reasoned that plaintiff's argument was untenable. *Id.* at *25. The court explained its conclusion with the following:

> "Plaintiff's position would permit any individual who does not work for the government to bring a federal suit whenever any state actor mistreats him or her as a result of any speech or expressive conduct. Because nearly all activity is expressive conduct of some kind, plaintiffs' theory would create a right of action under section 1983 whenever an individual suffers an 'adverse' action at the hands of the state. Every discretionary decision made any government official or actor would give rise to a federal cause of action. Such a sweeping proposition

> and extension of First Amendment protection is unsupportable."

Id. at *25-26.

In *Rodgers v. Duncanville Indep. Sch. Dist.*, No. 3-04-CV-0365-D, 2005 U.S. Dist. LEXIS 5705, *10-11 (N.D. TX April 5, 2005), the District Court for the Northern District of Texas held that a parent's speech could not establish a violation of his First Amendment rights because the speech did not involve a matter of public concern. The court cited to *Landstrom* and *Clark*.

The *Connick* standard has also been applied to First Amendment retaliation claims of citizens who are not parents of public school students. The District Court for the Northern District of Illinois applied the *Connick* standard to a father's retaliation claim against employees of a child and family services agency. *Johnson v. Collins*, No. 98C3516, 2003 U.S. Dist. LEXIS 7765 (N.D. IL May 7, 2003). The court inquired as to whether the plaintiff's speech "addressed a matter of public concern." *Id.* at *14. It cited *Landstrom* for the proposition that purely personal complaints could not support a First Amendment claim. *Id.*

The Second Circuit has implicitly adopted the reasoning of the Seventh Circuit. In *Cottone v. Marcus*, No. 95-7701, 1996 U.S. App. LEXIS 2909 (2nd Cir. 1996), the court affirmed the ruling of the United States District Court for the Western District of New York, which had applied the *Connick* standard to the speech of a graduate student. The court did not offer

any explanation. Instead, it adopted the reasons stated in the Report and Recommendation of the Magistrate Judge in *Cottone v. Marcus*, No. 93-CV-6439L, 1995 WL 819035 (W.D. NY April 5, 1995). *Id.* at *3-4.

At the district court level, Cottone alleged that the Vice-President of Academic Affairs (Marcus) retaliated against him because he (Cottone) was not "politically correct." *Id.* at *11. He alleged that the retaliation was in the form of denying his application for readmission to the graduate history program at SUNY Brockport. *Id.* The court cited to *Landstrom, supra*, for the proposition that "the 'matter of public concern' analysis has been required in the public employment context, as shown in the above cited cases. Its use, however, has not been solely confined to this area." *Id.* The court found Cottone's claim to be without merit because it found "no genuine issue of fact that the denial of his readmission application was even remotely connected to the political views***." *Id.* at *11.

Within the Ninth Circuit, another district court decision has joined *Clark* and applied the *Connick* standard to a citizen's First Amendment retaliation claim. *Fields v. Marin Housing Auth.*, No. C99-04626CRB, 2002 U.S. Dist. LEXIS 1592 (N.D. CA January 16, 2002). In *Fields*, a citizen filed two complaints with HUD, alleging housing discrimination. *Id.* at *4. Fields also protested his treatment to the Berkeley Housing Authority and the Marin Housing Authority. *Id.* at *11-14. Fields alleged that his protests to these agencies resulted in them punishing him for activities he claims were

protected by the First Amendment. *Id.* at *24. Even though he was not a pubic employee, *Connick* was applied. *Id.* at *25. The District Court for the Northern District of California cited to *Landstrom* for support of its extension of *Connick* outside the employment context. *Id.*

B. Review should be granted because extending Constitutional protection to a parent's purely private speech to a school official greatly interferes with a public school's ability to operate efficiently and effectively.

Petitioner submits that his Petition should be granted because of the conflict which exists between the United States courts of appeals on the important matter of the definition of protected First Amendment speech. At one time, this issue could easily be resolved by a court. It could simply hold that *Connick* is limited to First Amendment claims of governmental employees. The analysis would end there. However, that time is past. A body of law has extended the public-concern test to cases analogous to public employment. Not forgotten in these limited extensions were the policy arguments in *Connick*, namely the need for the efficient provision of public services. Then, with *Landstrom*, the test was extended to the public school setting in one judicial circuit. From there, the issue was decided by several district courts in various jurisdictions.

This test at issue asks whether employees are speaking as citizens "about matters of public concern." The approach of the Sixth Circuit in *Jenkins* strip-

mines this inquiry. The Sixth Circuit only asks whether a parent is speaking. This is an ill-considered modification. It greatly interferes with a public school's ability to operate efficiently and effectively. Purely private complaints of a parent about her child are enough for that parent's speech to receive Constitutional protection in the Sixth Circuit.

For example, if a parent complains to a principal that her child's detention was unfair and three weeks later her child receives another detention, a lawsuit is born. This parent could sustain a First Amendment retaliation claim in a district court within the Sixth Circuit. The teacher who gave the child detention, the principal who talked with the parent and their school board employer could face a costly trial. After perhaps one or two years of litigation, a jury would be empaneled to determine whether this second detention was a retaliatory response to the parent's speech. Yet, the same parent's identical complaints would not survive summary judgment if the school is located in California or Illinois.

Regardless of the vagaries of geography, under the above scenario, the mere possibility of such a lawsuit would certainly change the dynamic of school administration. After the parental complaint is made, any discipline imposed upon that child could not be considered without legal consultation. Be it the result of talking in class or assaulting a teacher, any action taken to discipline the child could result in litigation, with no hope of success upon a summary judgment motion.

The Sixth Circuit dismissed defendants' policy arguments by suggesting that the second and third elements of a retaliation claim still remain as defenses to such litigation. (App. 13a). However, these elements cannot be used by a school official to support a qualified immunity defense. If any speech of a parent to a school official is "constitutionally protected activity," no school official is entitled to qualified immunity when a parent speaks and later claims that her child was mistreated.

Although the growing body of parental speech case law started small with one district court's concern about this issue, the question did not end in Illinois. Courts from New York to California have faced this issue and there is no indication that it will be resolved without this Court's direction. Litigation in the public school sector is not isolated to one or two regions of the country. It has become a reality of life and a constant source of financial concern to districts large and small, rural and urban.

Petitioner does not assert that all school litigation must be prevented for officials to be able to run their schools. This is not what the public-concern test mandates. The test is not a grant of total immunity from all parental litigation. It is simply a furtherance of a well-reasoned policy which recognizes that a citizen's speech about purely private matters should not be the basis of a federal lawsuit.

Moreover, the rule which Petitioner seeks will not deprive a parent of judicial relief. Under the facts of *Jenkins*, the alleged retaliation complaint to Family Services, if not made "in good faith," would not be

subject to Ohio's statutory immunity for reporting child abuse or neglect. O.R.C. §2151.421(G)(2). Thus, Respondent could have pursued her claim in the state court, where it belonged.

Courts have released the *Connick* genie from its bottle. No longer can a court simply hold that the public-concern test is limited solely to the First Amendment retaliation claims of governmental employees. Unfortunately for the courts and the parties before them, there is no consensus on what constitutes protected parental speech. Instead, there is a direct conflict between the *Jenkins* followers and the *Landstrom* followers. On an issue of such vital importance, this conflict should be resolved without delay. Likewise, a school official's business address should not dictate that official's entitlement to qualified immunity. Petitioner submits that the Court's guidance is urgently needed to resolve this compelling and important issue.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

R. Gary Winters
Counsel of Record
McCaslin, Imbus & McCaslin, LPA
The Provident Building
632 Vine Street, Suite 900
Cincinnati, OH 45202-2442
(513) 421-4646

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-4550/4551

[Filed January 17, 2008]

SHARA JENKINS, individually and as legal guardian of Shanell Ratcliff (06-4550); BRENDA MULKEY, individually and as legal guardian of Charles Littlejohn (06-4551), *Plaintiffs-Appellants,*

v.

ROCK HILL LOCAL SCHOOL DISTRICT and LLOYD EVANS, individually and in his official capacity as Superintendent of Rock Hill Local School District, *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
Nos. 04-00180; 04-00269
Susan J. Dlott, District Judge.

Argued: December 5, 2007

Decided and Filed: January 17, 2008

Before: DAUGHTREY and COLE, Circuit Judges; COLLIER, Chief District Judge.*

COUNSEL

ARGUED: Michael Garth Moore, LAW OFFICE OF MICHAEL MOORE, Columbus, Ohio, for Appellants. R. Gary Winters, McCASLIN, IMBUS & McCASLIN, Cincinnati, Ohio, for Appellees.
ON BRIEF: Michael Garth Moore, LAW OFFICE OF MICHAEL MOORE, Columbus, Ohio, for Appellants. R. Gary Winters, Ian R. Smith, McCASLIN, IMBUS & McCASLIN, Cincinnati, Ohio, for Appellees.

OPINION

CURTIS L. COLLIER, Chief District Judge. Plaintiffs Shara Jenkins ("Jenkins") and Brenda Mulkey ("Mulkey") filed this consolidated appeal challenging the district court's grant of summary judgment to defendants Lloyd Evans ("Evans") and the Rock Hill School Board ("School Board") on their First Amendment retaliation and privacy claims. In analyzing the retaliation claims, the district court incorrectly limited constitutionally protected activities to matters of public concern. However, because the district court reached the correct decision on all claims

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* The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

except Jenkins's retaliation claim against Evans, we REVERSE the district court's decision on that claim and AFFIRM its decision on all others.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Jenkins and Her Daughter, Shanell

This case stems from a dispute between Jenkins and school officials over the treatment of Jenkins's daughter, Shanell. Shanell was enrolled in first grade at Rock Hill Elementary School ("Rock Hill") in March 2000. That month, Shanell was diagnosed with diabetes, and Jenkins made arrangements with the school nurse, Marsha Wagner ("Wagner"), for Wagner and other school personnel to assist Shanell with her diabetes treatment.

There were no problems until Shanell started second grade in the 2000-2001 school year. Jenkins again arranged with Wagner for school personnel to assist Shanell. However, there was an apparent misunderstanding between Jenkins and Wagner over whether Wagner would administer an insulin shot if she received proper written authorization from Jenkins and Shanell's doctor. This confusion led Jenkins to believe Rock Hill was being uncooperative in caring for Shanell.

Because Rock Hill would not administer insulin shots, Jenkins contacted Evans, the school superintendent, on October 29, 2001. In her affidavit, Jenkins alleges Evans told her the school was not responsible for Shanell's medical care and suggested

she enroll Shanell in a different school. Jenkins then contacted the School Board on November 19 and the Ohio Coalition for Children with Disabilities on November 26.

The following day, November 27, 2001, Jenkins alleges Evans called her and told her Shanell could not come back to school. This prompted Jenkins to contact the U.S. Department of Education's Office of Civil Rights, the Ohio Department of Education, a county commissioner, and members of the School Board.

After Shanell missed over a week of classes, Evans relented and allowed Shanell to return to school on December 6. The next day, Jenkins claims school personnel barred her from going to Shanell's classroom, while other non-employees freely walked through the building as Jenkins normally did. Defendants respond that Jenkins was stopped at the front office because she was required to comply with the general policy of signing in before seeing her daughter during school hours. Jenkins claims that when she confronted Evans about this incident and the school's role in caring for Shanell, Evans threatened to involve the Lawrence County Department of Job and Family Services ("Children Services") in the matter. "Ms. Jenkins," he allegedly explained, "you contacted the Office of Civil Rights and got an investigation started, so I figured I'd start one of my own."

The next week, on December 13, 2001, the Ironton Tribune newspaper printed a letter to the editor written by Jenkins:

I have a 7-year-old daughter who is diabetic and has attended Rock Hill No. 2 school for three years. I received a phone call from the superintendent Nov. 27 and was told I couldn't bring my daughter back to school. I was told she wasn't enrolled there anymore.

The school took it upon themselves to withdraw her without my permission and said that I was the one who withdrew her. We tried going to the school and got escorted out by a teacher. I made contacts with the state and got her back in school after she missed seven days.

Now, we are being treated differently, just because I'm fighting for my daughter's rights. There's only one teacher in the school willing to take responsibility for my daughter's health issues. This goes to show you how much "teachers" care about your children.

She also filed a complaint with the U.S. Department of Education, which the agency received on December 17.

On December 19, 2001, a call was placed from the Rock Hill principal's office to Children Services. In that call, Wagner provided information about Jenkins and Shanell. Children Services filed a court complaint against Jenkins in January 2002, but the charges were dropped as unsubstantiated in May 2002.

When Jenkins accused Evans of calling Children Services, she contends that he responded, "I told you I was going to involve Children Services . . . I don't like

to be pushed around. I don't take that too lightly." When she told Evans their disputes would have to be settled in court, he suggested she would be wasting her time. "I have a lot more pull than you do, and there's no attorney gonna stand up to me, because they know they can't win," she recounts him saying.

Also in January 2002, Shanell's doctor recommended she be home-schooled, and Shanell stopped attending school. Rock Hill initially provided a tutor but that person stopped tutoring Shanell for reasons unknown to her mother. Jenkins repeatedly requested Evans provide a tutor for Shanell but Evans allegedly said he could not find anyone willing to tutor her. Without a tutor, Shanell did not receive her education the last three months of the school year. The next school year, she transferred to another school district.

B. Mulkey and Her Son, Charles

Mulkey enrolled her son Charles in Rock Hill in January 2003. Charles had diabetes, so school nurse Wagner checked his blood sugar regularly. Mulkey received frequent calls from Wagner telling her to pick Charles up from school because his blood sugar was high or he was not feeling well. Mulkey felt that some of those calls were unnecessary. She complained about the calls to Wagner. She then brought her concerns to Evans, who disagreed with her concerns. Evans also suggested the possibility of home-schooling, which Mulkey declined because Charles's doctor recommended he attend school with other kids.

On March 18, 2003, Charles was sick so Wagner tried to contact Mulkey, but Mulkey's phone was disconnected. In addition, Wagner was running low on medical supplies that Mulkey was supposed to supply for Charles. Wagner, after consulting with the school principal, called Children Services to report possible child neglect. A Children Services investigator interviewed her, causing her no expense or hardship, and then closed the case.

Two weeks after the Children Services call, on April 4, 2003, Mulkey moved to her father's property in another school district and enrolled Charles in that district.

II. STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment de novo. *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 619 (6th Cir. 2006). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must construe the facts and draw all inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

III. DISCUSSION

Plaintiffs brought their claims for violations of the First Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983, which allows a plaintiff

to vindicate the deprivation of constitutional rights by a defendant acting under color of law. *Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005).

A. Retaliation

Plaintiffs allege they were retaliated against in violation of the First Amendment. There are three elements to a retaliation claim:

> (1) the plaintiff was engaged in a constitutionally protected activity;
> (2) the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity;
> and
> (3) the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998). If the plaintiff meets this burden, the burden of production shifts to the defendant, *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999) (en banc), but if the defendant can show he would have taken the same action in the absence of the protected activity, he is entitled to summary judgment. *Id.*

In granting summary judgment to Defendants, the district court incorrectly held that Jenkins's and Mulkey's speech was not constitutionally protected because it did not touch upon a matter of public concern. The public concern test originated in *Pickering v. Board of Education*, 391 U.S. 563 (1968)

and *Connick v. Myers*, 461 U.S. 138 (1983), in which the Supreme Court held the First Amendment protects from retaliation government employees who speak on matters of public concern.[1] 461 U.S. at 147. Following its rationale in *Pickering*, the Court in *Connick* sought to balance the interests of government employees, as citizens, "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 142 (citing *Pickering*, 391 U.S. at 568). To achieve this balance, the Court held the speech of government employees is constitutionally protected if it touches upon a matter of public concern. *Connick* was expressly limited to government employees and based solely on the need to balance the free speech rights of government employees with the government's needs as an employer. *See id.* at 154; *Thaddeus*, 175 F.3d at 390 ("The story of the public concern limitation is a story about the free speech of public employees.").

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[1] In fact, the public concern test actually expanded the free speech rights of public employees. *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1957 (2006) (noting that *Pickering* and *Connick* changed the dogma that public employees surrender all their First Amendment rights by reason of their employment); *Rutan v. Republican Party*, 497 U.S. 62, 95 (1990) ("Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason."); *Van Deelen v. Johnson*, 497 F.3d 1151, 1156-57 (10th Cir. 2007) ("The public concern test was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens.").

The Supreme Court has used the public concern test in situations analogous to public employment, where free speech rights must be balanced against the need to effectively manage a governmental entity. *See Tenn. Secondary Sch. Ath. Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495 (2007) (coaches voluntarily participating in an athletic league); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 673 (1996) (government contractors). Courts have made other similar extensions of the public concern test. *Blackburn v. City of Marshall*, 42 F.3d 925, 932-34 (5th Cir. 1995) (describing cases involving doctors suing public hospitals over staff privileges and licensees suing government agencies, but declining to use public concern test in context of towing company owner who sued police official).

Beyond those limited extensions, applying "the public concern test outside the public employment setting would require us to rend it from its animating rationale and original context." *Van Deelen*, 497 F.3d at 1156-57; *see also Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004) ("To expand this public concern limitation into the broader context of all citizen speech would wrench it from its original rationale and curtail a significant body of free expression that has traditionally been fully protected under the First Amendment."); *Campagna v. Mass. Dep't of Envtl. Prot.*, 334 F.3d 150, 155 (1st Cir. 2003); *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000); *Vickery v. Jones*, 100 F.3d 1334, 1346 n.1 (7th Cir. 1996); *United States v. Reyes*, 87 F.3d 676, 680 (5th Cir. 1996).

This circuit has likewise recognized the limited nature of the public concern test, in a case that we find dispositive here. *Gable v. Lewis*, 201 F.3d 769 (6th Cir. 2000). In *Gable*, the plaintiff alleged a police officer retaliated against her in violation of her First Amendment right to petition the government for a redress of grievances. 201 F.3d at 770. The plaintiff won a jury trial, and the defendant appealed, arguing–among other issues–that the public concern test should have applied. The Sixth Circuit rejected the defendant's argument, holding that the public concern test is not applicable to petitioning activity outside the public employee context. *Id.* at 771-72.[2] The Court noted that *Connick* created the public concern test because government agencies need the ability to maintain order in their workplaces, which was inapplicable to the situation of a private individual petitioning the government for the redress of grievances. *Id.* Likewise, the reason does not apply in the context of parents criticizing school officials. In

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[2] Defendants argue *Gable* has been implicitly overruled by *Jones v. Union County*, 296 F.3d 417, 426 (6th Cir. 2002). The *Jones* panel could not have overruled the *Gable* panel. 6 Cir. R. 206(c); *United States v. Washington*, 127 F.3d 510, 517 (6th Cir. 1997) ("[O]ne panel cannot overrule a prior panel's published decision."). *Jones* states, without any discussion, "actions under the Petition Clause are limited to matters of public concern." This quote, which was one of two alternative grounds for the Court's holding, was taken from *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220, 1226 (6th Cir. 1997), which is a public employment case. For that proposition, *Valot* cites six cases from various circuits, all of which are in the public employment context. The cases merely show that the public concern test applies to petitioning activity for public employees.

addition, the Court noted that "the petition clause itself is not generally limited to matters of 'public concern' as described in the *Connick* case but includes the petitioner's private business interests." *Id.* Likewise, the Supreme Court has held that private speech is protected just like speech on public matters. *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

It is logical to extend *Gable*'s holding from petitioning to all speech because those rights are "inseparable." *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (The right to petition "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble . . . These First Amendment rights are inseparable."); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.").

Defendants cite four cases, all from outside this circuit, for their argument the public concern test applies when parents of school children criticize school officials. Three of those cases are district court decisions that adopt, without analysis or explanation, the public concern test for parents criticizing school officials. The fourth case is *Landstrom v. Illinois Department of Children & Family Services*, 892 F.2d 670, 679 (7th Cir. 1990), in which the Seventh Circuit did not discuss the issue but, instead, merely stated it agreed with the lower court's analysis. The lower court

had relied on *Pickering* and *Connick* to guide its opinion as to what constitutes an exercise of First Amendment rights, and determined parental criticism of school officials must touch upon a public concern to constitute the exercise of First Amendment rights. *Landstrom v. Illinois Dep't of Children & Family Services*, 699 F. Supp. 1270, 1278 n.17 & n.18 (N.D. Ill. 1988). However, as noted above, *Pickering* and *Connick* concern the exercise of First Amendment rights only by public employees. Because public employees lack free speech rights in the context of their employment, those cases ensure public employees can speak on matters of public concern. It seems apparent to us that the district court in *Landstrom* fell into the same error as the district court in this case. We respectfully decline to follow the Seventh Circuit's mistaken analysis.

Nevertheless, Defendants argue the public concern test is necessary to prevent frequent disputes between parents and school officials from becoming First Amendment lawsuits But that purpose is served by the other two elements of a First Amendment retaliation claim. The element at issue here, constitutionally protected activity, cannot be so limited. Essentially, Defendants' contention is that parental speech about school officials is not constitutionally protected if the speech is not about matters of public concern. Such a contention is clearly wrong. Speech is generally protected by the First Amendment, with restrictions on only limited types of speech, such as obscenity, defamation, and fighting words. *R. A. V. v. St. Paul*, 505 U.S. 377, 382-83 (1992), none of which is applicable here. Defendants have not pointed to any case from the Supreme Court

or this Court that parents criticizing school officials is off-limits when the speech is not about matters of public concern. Rather, the right to criticize public officials is clearly protected by the First Amendment. *Bloch*, 156 F.3d at 678 (citing *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) ("The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is the central meaning of the First Amendment.")).

Had the district court applied the proper definition of constitutionally protected activity, the Court would have recognized both Jenkins and Mulkey satisfy the first element of a prima facie First Amendment retaliation claim. Jenkins complained to Evans, wrote a letter to a newspaper, and contacted government officials and agencies; all these activities are constitutionally protected speech. Mulkey complained to Wagner and Evans, which is also constitutionally protected speech.[3]

In Jenkins's case, the district court did not reach the remaining two elements of a prima facie case, but it is nevertheless evident she satisfies them. As to the second element, a jury could conclude Evans's alleged actions, dismissing Shanell from school, being involved in making a false report to Children Services, and

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[3] Because Jenkins and Mulkey are also pursuing claims on behalf of Shanell and Charles, the two children are also plaintiffs. Neither child presents a prima facie case because there is no evidence either engaged in any constitutionally protected speech, so the district court properly granted summary judgment on the claims by Shanell and Charles.

refusing to provide home-school education through the services of a tutor, would chill a person of ordinary firmness from engaging in speech. Jenkins also satisfies the third element because Evans allegedly admitted that Jenkins's complaints prompted him to be involved in reporting her to Children Services. *See* Fed. R. Civ. P. 56(c) (nothing that on a motion for summary judgment, we view all facts in favor of Jenkins). Therefore, the district court erred in granting summary judgment to Evans on Jenkins's retaliation claim.

In Mulkey's case, the district court noted there is "no evidence of any retaliation in this case." Mulkey did not challenge this determination on appeal, and there is no proof that Evans took adverse action against Mulkey. Instead, the evidence establishes Wagner called Children Services because she could not contact Mulkey and Mulkey had not provided necessary medical supplies for Charles. Accordingly, the district court did not err in granting summary judgment to Evans on Mulkey's retaliation claim.

The district court also did not err in granting summary judgment to the School Board on both Jenkins's and Mulkey's claims because there is no respondeat superior liability in actions under § 1983, and there is no evidence a government custom or policy led to any adverse action against Plaintiffs. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006).

B. Invasion of Privacy

Plaintiffs also allege violations of their right to privacy under the First Amendment. Although they brought these claims under the First Amendment, there is no indication or argument supporting a privacy violation based on the First Amendment. *Compare with NAACP v. Alabama*, 357 U.S. 449, 462 (privacy in associations protected by First Amendment), *Perry v. McGinnis*, 209 F.3d 597, 609 (6th Cir. 2000) (substantive due process claim based on fundamental right of freedom of expression).

Instead the parties presented arguments relying on the substantive due process clause of the Fourteenth Amendment. The basis for Plaintiffs' arguments is that Defendants caused Wagner to falsely report to Children Services that Shanell and Charles were being medically neglected.[4]

As a preliminary matter, as discussed previously, there is no evidence Evans caused Wagner to make a false report about Charles, nor is there evidence the School Board, through an official or unofficial policy or custom, was involved in reporting either Shanell or Charles. Thus, assuming *arguendo* there was a privacy violation committed, the only possible claim is by

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[4] In her reply brief, Jenkins argues the privacy claim is also based on Shanell's disenrollment from school and Rock Hill's "intentional refusal" to provide a tutor. These claims were not mentioned in her original brief, and they are therefore waived. *United States v. Campbell*, 279 F.3d 392, 401 (6th Cir. 2002) ("[T]he appellant cannot raise new issues in a reply brief.").

Jenkins against Evans, who may be liable because there is evidence he proximately caused Wagner to make the false report about Shanell. *See Cameron v. Pontiac*, 813 F.2d 782, 786 (6th Cir. 1987); *see also Brokaw v. Mercer County*, 235 F.3d 1000, 1012 (7th Cir. 2000) ("An official causes a constitutional violation if he sets in motion a series of events that defendant knew or reasonably should have known would cause others to deprive plaintiff of constitutional rights.") (citing *Morris v. Dearborne*, 181 F.3d 657, 672 (5th Cir. 1999)).

The Fourteenth Amendment guarantees "due process of law" for any deprivation of "life, liberty, or property." U.S. Const. amend XIV § 1. This guarantee includes both procedural and substantive components. The substantive component incorporates most guarantees of the Bill of Rights, and it also protects other "fundamental rights and liberties which are, objectively deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). The Fourteenth Amendment "forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 721 (internal quotations omitted).

The substantive due process clause protects two types of privacy rights. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977): (1) an individual's right to make "personal decisions relating to marriage, procreation,

contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); and (2) an individual's "interest in avoiding disclosure of personal matters." *Whalen*, 429 U.S. at 599; *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998). Plaintiffs assert their claim based on both types of privacy rights.

1. Fundamental Right of Child Rearing

Plaintiffs claim a "parent's right to the orderly rearing and education of her child is afforded constitutional protection." Indeed, parents have a liberty interest in the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (Fourteenth Amendment prevents "unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control."); *Barrett v. Steubenville City Schools*, 388 F.3d 967, 972 (6th Cir. 2004) (noting the fundamental right of parents to raise their child has been clearly established); *Johnson v. City of Cincinnati*, 310 F.3d 484, 499 (6th Cir. 2002) ("[A] family member's right to participate in child rearing and education is one of the most basic and important associational rights protected by the Constitution.").

Evans's actions against Plaintiffs did not violate their fundamental rights. Mulkey was subjected to an interview and Jenkins was subject to an investigation and court complaint. But neither was deprived of her child. Neither lost care, custody, or control of her child nor the right to raise her child. At most, they were

victims of something resembling malicious prosecution or defamation, neither of which are cognizable as constitutional violations of privacy. *Albright v. Oliver*, 510 U.S. 266, 271 n.4 (1994); *Paul v. Davis*, 424 U.S. 693, 702 (1976). There are cases in other circuits finding that parents who lost custody of their children because of malicious, false reports suffered constitutional violations. *Brokaw*, 235 F.3d at 1018-19; *Morris v. Dearborne*, 181 F.3d 657, 667 (5th Cir. 1999); *Gedrich v. Fairfax County Dep't of Family Servs.*, 282 F. Supp. 2d 439, 461 (E.D. Va. 2003). Here, however, there was no separation. There is no constitutional violation in merely being subjected to a false report. *See also Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (holding that a "child abuse investigation does not, in and of itself, constitute a constitutional deprivation").

2. Avoiding Disclosure of Private Matters

Plaintiffs also base their privacy claim on the alleged disclosure of information to Children Services. In *J.P. v. DeSanti*, 653 F.2d 1080, 1091 (6th Cir. 1981), this Court rejected the idea there is a general constitutional right of nondisclosure of personal information. Rather, "any constitutional right to privacy must be restricted to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty." *Kallstrom*, 136 F.3d at 1062 (citing *DeSanti*, 653 F.2d at 1090) (internal quotation marks omitted).

In *Kallstrom*, the Court identified a situation where nondisclosure of personal information was a

constitutionally protected right: undercover police officers have a constitutionally protected privacy interest in some personal information contained in their personnel files under the substantive due process clause. 136 F.3d at 1059. The officers' privacy interests in the personal information are of a constitutional dimension because they implicate a fundamental liberty interest, namely, their lives, their families' lives, and their personal security. *Id.* at 1062. Their personal security was threatened because the release of that information created a "serious risk to the personal safety" of the officers and their families from a violent gang likely to seek revenge. *Id.* at 1063. This Court has also held that "information regarding private sexual matters warrants constitutional protection against public dissemination." *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998).

Kallstrom "did not create a broad right protecting plaintiffs' personal information." *Barber v. Overton*, 496 F.3d 449, 456 (6th Cir. 2007) (release of correctional officers' social security numbers was not sensitive enough to warrant constitutional protection despite threat of retaliation); *see also Bailey v. City of Port Huron*, --- F.3d ----, No. 06-2375, 2007 WL 3196505 (6th Cir. Nov. 1, 2007) (criminal suspects have no constitutional right to privacy in their mug shots or in information contained in a police report); *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002) (no privacy interest in personal financial affairs); *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994) (disclosure of HIV infection not violation of constitutional right to privacy).

Here, Plaintiffs lack a constitutional invasion of privacy claim because they were not put at a serious risk of losing a fundamental liberty interest. Although Jenkins did face a court complaint for child neglect, she was not separated from her child. The same is even more true for Mulkey; any harm to her from being interviewed by a Children Services investigator was at most de minimis.

For the same reason that Plaintiffs were not deprived of a fundamental right, they were not victimized by the dissemination of information that is not of a constitutional magnitude. Because Plaintiffs' privacy claims fail under either theory, the district court did not err in granting summary judgment on those claims.

C. District Court's Factual Summaries

Plaintiffs also challenge the district court's orders granting summary judgment, contending they made improper credibility determinations and disputing some of the word choices the court used. Having reviewed the evidence in these cases and the district court's opinions, we conclude this challenge is without merit.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED with regard to Jenkins's First Amendment retaliation claim against Evans and is AFFIRMED on all other claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:04CV180

[Filed November 21, 1006]

Shara Jenkins,	)
	)
Plaintiff,	)
	)
v.	)
	)
Board of Education,	)
Rock Hill Local School District, et al.,	)
	)
Defendants.	)
	)

Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion to Strike

This matter is before the Court on Defendants' motion for summary judgment (doc. 19), Plaintiff's memorandum in opposition thereto (doc. 20), Defendants' reply in support of its motion (doc. 21), Plaintiff's motion to strike Defendants' reply (doc. 22), and Defendants' memorandum in opposition to

Plaintiff's motion to s vtrike (doc. 23). For the reasons that follow, the Court grants Defendants' motion for summary judgment and denies Plaintiff's motion to strike.

I. BACKGROUND

Plaintiff Shara Jenkins filed this lawsuit, individually and in her capacity as mother and legal guardian of Shanell Ratcliff, against the Rock Hill Local School District Board of Education (the "Board") and the school's superintendent, Lloyd Evans, in his official and individual capacities. Jenkins made the following claims in her complaint: (1) violation of her and her daughter's First Amendment rights to free expression and privacy, (2) slander, (3) intentional infliction of emotional distress, and (4) invasion of privacy. (Doc. 1.) After Defendants moved for summary judgment on each of Jenkins' claims, Jenkins dismissed the three state law claims. (Doc. 20 at 12.) Accordingly, only Jenkins' First Amendment claims, brought pursuant to 42 U.S.C. § 1983, remain for the Court's consideration.

Neither Jenkins' Complaint nor her memorandum in opposition to Defendants' motion for summary judgment precisely articulate the origin of the dispute between Jenkins and the school. Nonetheless, the Court has gleaned the following facts from the record. In March 2000, Jenkins' daughter Shanell Ratcliff was diagnosed with Type I diabetes. Jenkins enrolled Shanell as a first-grade student at the Rock Hill Elementary School for the 2000-2001 school year. Jenkins filled out three "Administration of Medication" forms for the 2000-2001 school year that gave Rock

Hill employees permission to assist Shanell with her diabetes management. (Jenkins dep. Ex. I.) Specifically, the forms instructed Rock Hill to monitor Shanell's blood glucose levels and to take the following actions: if Shanell's glucose was less than 70, the school was to call Jenkins and give Shanell orange juice; if it was greater than 200, the school was to call Jenkins and give Shanell water; and if Shanell lost consciousness, the school was to administer Shanell a glucogen shot and call both Jenkins and Shanell's physician. (*Id.*) These Administration of Medication forms were signed by both Jenkins and Shanell's doctor. (*Id.*) It appears that Jenkins had no complaints with the way Rock Hill responded to Shanell's diabetes during the 2000-2001 school year. (Jenkins dep. vol. II, 110.)

Jenkins enrolled Shanell at Rock Hill as a second-grade student in for the 2001-2002 school year. Again, Jenkins filled out three "Administration of Medication" forms that gave Rock Hill employees permission to assist Shanell with her diabetes management. (Jenkins dep. Ex. C.) The 2001-2002 forms authorized somewhat different measures than the previous year, allowing Rock Hill to take the following actions: if Shanell's glucose was above 250, the school was to call Jenkins to administer insulin[1] to Shanell; and if Shanell lost consciousness, the school was to administer Shanell a glucogen shot. (*Id.*) These forms were signed by Jenkins and Shanell's physician. (*Id.*)

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[1] The brand of insulin prescribed to Shanell was Humalog® and is referred to as such in the record.

Jenkins alleges that sometime in October 2001, the Defendants became "uncooperative" with her, and she became dissatisfied with Rock Hill's response to Shanell's diabetes. (Doc. 1 ¶ 14; Jenkins dep. vol. II, 115-120.) Apparently, the grandmother of a diabetic child enrolled in a different school district told Jenkins that Jenkins did not have to go to the school to administer Shanell's insulin shots. (Jenkins dep. vol. II, 28.) Jenkins then told the school nurse, Marsha Wagner, that she wanted the nurse to give Shanell insulin shots if her blood sugar tested higher than the acceptable limit of 250. (*Id.* at 104, 124-25.)

Nurse Wagner told Jenkins that she needed written authorization from Shanell's doctor in order to have a school official administer insulin to Shanell. (Jenkins aff. ¶ 21; Jenkins dep. vol. II, 133-34.) However, Jenkins never gave the school an Administration of Medication form permitting Wagner to give Shanell such an injection. (Jenkins dep. vol. II, 88-89, 123-24.) Jenkins testified that she did not fill out an authorization form to instruct anyone at the school to inject Shanell with insulin because she "couldn't write something down that they refused to do." (*Id.* at 95.) Jenkins claims that Nurse Wagner said she was unable to administer Shanell's insulin shots because "she'd be liable" if she did. (*Id.* at 124-25.) It appears from the record that at some point in the Fall of 2001, Nurse Wagner asked Shanell what she ate every day at home. (*Id.* at 43-44.) When Jenkins learned of this, she told Nurse Wagner not to ask Shanell what she ate anymore because Jenkins "didn't feel that it was any of her [Nurse Wagner's] business" and that it was an invasion of Shanell's privacy. (*Id.* at 44-45.) Defendants assert that Nurse Wagner provided

medical care to Shanell consistent with the course of treatment prescribed by Shanell's doctor.

Jenkins alleges that she spoke with school superintendent Lloyd Evans on October 29, 2001 about her concerns over the school's participation in giving Shanell medication. (Jenkins aff. ¶ 18.) Jenkins then contacted the Board of Education and the Ohio Coalition to complain about the school's response to Shanell's diabetes. (*Id.* at ¶¶ 29, 30.) Jenkins alleges that Superintendent Evans then called her on November 27, 2001 and told her not to bring Shanell back to Rock Hill. (*Id.* at ¶ 31.) Shanell missed approximately seven days of school as a result of a dispute over whether Shanell was still enrolled in the school. (Jenkins dep. vol III, 76-77, 80.) Jenkins contacted the Office of Civil Rights. (Jenkins aff. ¶ 32.)

Shanell returned to school on December 6, 2001. (Jenkins aff. ¶ 38.) The following day, Jenkins claims that she was barred from Shanell's classroom and was told to sign in at the front office. (Jenkins aff. ¶ 44.)[2] Defendants respond that Jenkins was stopped at the front office because she was required to comply with the general policy of signing in before seeing her daughter during school hours. (Doc. 19 at 6.) Jenkins claims that when she confronted Superintendent Evans about this latest episode in what she perceived to be a string of injustices, he warned that he would be calling Children's Services. (Jenkins aff. ¶ 48.) Jenkins

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[2] Jenkins in her deposition testified that it was December 20, 2001 when she was asked to start checking in upon her arrival at the school. (Jenkins dep. vol III, 111.)

wrote a letter to the editor of the *Ironton Tribune* criticizing Rock Hill administrators for what she regarded as their unwillingness to treat Shanell fairly, and the *Tribune* published the letter on December 13, 2001. (*Id.* at ¶ 49, Ex. A.)

On December 18, 2001, Nurse Wagner called Shanell's doctor's office to find out what the school was supposed to do if Shanell's blood sugar tested above 250 but the school could not get in touch with Jenkins to administer Shanell's insulin injection. (Jenkins dep. vol. II, 98-99.) Jenkins testified that Nurse Wagner should never have contacted Shanell's doctor because "they [the school] were the ones supposed to administer Humalog [insulin]."[3] Jenkins then filed a complaint against Shanell's doctor with the Ohio State Medical Board for talking with Nurse Wagner about Shanell's condition. (*Id.* at 96-97.)

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[3] Jenkins argues that even though she did not provide the school with authorization to administer Shanell's insulin, the school should have done so anyway.

"Q. The instruction [in the Administration of Medication form] was that they were to call you, wasn't it, in that form?

A. What else could they do if they wouldn't do it theirself.

Q. And if they couldn't reach you what did you want them to do?

A. They should know what to do. The nurse said she was trained.

Q. If she needed a shot and your instructions were to call you and they couldn't reach you, what did you want them to do?

A. Well, they should have give her Humalog but they didn't want to do that." (Jenkins dep. vol. II, 102.)

On December 19, 2001, an anonymous caller filed a complaint against Jenkins with the Lawrence County Department of Job and Family Services (hereafter "Family Services"). (Porter dep. 12.) The next day, Family Services investigator Richard Blankenship informed Jenkins that she was being investigated for medically neglecting Shanell. (Jenkins dep. vol. III, 81-82.) Jenkins claims that Blankenship told her either Superintendent Lloyd Evans or school principal Fred Evans made the complaint. (Jenkins dep. vol. III, 152-54.) Lloyd Evans testified that he did not make the complaint to Family Services. (Evans dep., vol. III, 39.) On January 22, 2002, Family Services filed a complaint against Jenkins in the Lawrence County Court of Common Pleas. (Doc. 20 at 6.) Family Services dismissed the complaint in May 2002.

In early January 2002, Shanell's physician recommended that Shanell begin home schooling. (Jenkins dep. vol. III, 117, 144.) Jenkins took the recommendation letter to Superintendent Evans, who told her he would contact a tutor. (*Id.* at 118.) Jenkins does not deny that Shanell's doctor suggested home schooling, but she also argues that Shanell's exit from Rock Hill Elementary was related to a confrontation between Shanell's sister and school administrators on

January 3, 2002. (*Id.* at 132.)[4] Shanell's last day of school at Rock Hill was January 3, 2002. (*Id.*)

Rock Hill was charged with providing Shanell's home school education through the services of a tutor. (Doc. 20 at 7; doc. 21 at 5.) Defendant Evans contends that the tutor was having difficulty coordinating with Jenkins and that "the school was not able to locate a replacement tutor." (Doc. 21 at 6.) Jenkins claims that the assigned tutor only came to work with Shanell four times and that, as a result, Shanell obtained no schooling for the last three months of the 2001-2002 school year. (Jenkins dep. vol. III, 174, 180.) Jenkins enrolled Shanell in a different school, Dawson Bryant, for the following school year. (*Id.* at 121.)

Jenkins' claim against the school board is based on her allegation that the board failed to act in support of her and Shanell.[5] Specifically, she testified that she

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[4] Apparently Jenkins sent her daughter April to school with Shanell that day so April could give Shanell her insulin injection. Jenkins claims that a prosecutor and Family Services investigator Blankenship were at the school, and that the prosecutor called her and said that if April didn't leave the school he would arrest her. Blankenship then asked Jenkins to come to the school to administer Shanell's insulin. Jenkins refused, telling the school that April could do it. April did not administer Shanell's insulin shot but went home. Jenkins and April then went back to the school and picked up Shanell. (Jenkins dep. vol. III, 133-39.)

[5] "Q. So you're saying because the board members didn't do anything, that harmed you and your daughter? A. Yes." (Jenkins dep. vol. III, 165.) "Q. Why did you sue the Board of Education? A.

felt that the board had not done enough to oppose Superintendent Evans. (*Id.* at 183.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On a motion for summary judgment, the movant has the burden of showing that no genuine issues of material fact are in dispute, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must go beyond the pleadings and "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The nonmoving party "must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The task of the Court is not "to weigh the evidence and determine the truth of the matter but to determine

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Because I felt they could have done more than what they done." (*Id.* at 225.)

whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. A genuine issue for trial exists when the evidence is not "so one-sided that one party must prevail as a matter of law." *Id.* at 252.

III. ANALYSIS

A. Failure to Exhaust Remedies Under the Individuals with Disabilities Education Act (IDEA)[6]

The Court first addresses Defendants' contention that Jenkins' claim is essentially a "back door IDEA action" and that her claim fails because she did not exhaust her administrative remedies under the IDEA. (Doc. 19 at 7.) Defendants argue that, although Jenkins brings her claim under the First Amendment,

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[6] Jenkins' Complaint muddles various potential claims and theories of liability and is maddeningly imprecise as to what federal rights Defendants allegedly violated and what remedies she seeks. As a result, both the Court and the Defendants are forced to parse the Complaint and guess as to Jenkins' true aim. By failing to plainly plead her case and articulate facts relevant to support actual claims, Plaintiff makes the Court's task of ruling on Defendants' motion for summary judgment needlessly difficult. Specifically, the Court is compelled to resolve whether Plaintiff's claim is, indeed, within the ambit of the IDEA because, although she argues that her claims "do not implicate the IDEA" (doc. 20 at 12), Plaintiff asserts in her Complaint that she seeks to "vindicate rights guaranteed Plaintiff and her minor daughter under ... the laws of the United States guaranteeing equal access to public education by persons with disabilities" (doc. 1 ¶ 19). Jenkins would have been better served had she decided what rights she hoped to vindicate before she filed her complaint.

it is actually an IDEA action because she alleges Defendants violated Shanell's right to an equal access to public education as a person with a disability. According to Defendants, even if a plaintiff does not bring a claim under the IDEA, exhaustion of IDEA administrative remedies is a prerequisite for filing any federal claim for relief which is also available under the IDEA. (*Id.*) Jenkins responds that her claim is not an IDEA action because the claims presented do not arise out of the IDEA, and she and her daughter do not seek any remedy available under the IDEA. (Doc. 20 at 13.) Jenkins further argues that even if the IDEA applied to the claims presented, she would not be required to exhaust administrative remedies because to do so would be futile. (*Id.* at 14.)

The IDEA (Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*) provides that plaintiffs must exhaust their administrative remedies before bringing suit in federal court to obtain relief that is also available under the IDEA. *Doe v. Smith*, 879 F.2d 1340, 1343-44 (6th Cir. 1989). However, exhaustion is not required if it would be futile or inadequate to protect the plaintiff's rights. *Covington v. Knox County Sch. Sys.*, 205 F.3d 912 (6th Cir. 2000).

In *Covington*, the plaintiff brought a § 1983 action against her son's school alleging violations of her son's Fourth, Fifth, and Fourteenth Amendment rights. As in this case, Covington's complaint did not allege violations of or even mention the IDEA, but the defendant argued it was entitled to judgment because Covington did not exhaust her administrative remedies under the IDEA. The Sixth Circuit Court of Appeals reversed the district court's grant of summary

judgment for the defendant, finding that "exhaustion is futile when ... damages are the only suitable remedy ... and yet damages are unavailable though the administrative process." *Id.* at 912. After concluding that exhaustion would be futile, the court declined to express an opinion as to whether Covington's complaint actually fell within the ambit of the IDEA. *Id.* at 916; *see also Unroe v. Board of Educ. Rock Hill Local School Dist.*, No.1:04-CV-181, 2006 WL 22081 (S.D. Ohio Jan. 4, 2006) (holding that because the children were no longer enrolled in the school, there was no remedy available under the IDEA).

Shanell is no longer enrolled as a student at Rock Hill, thus no administrative remedy could alleviate her alleged injuries. Therefore, the Court finds the reasoning of *Covington* applicable and concludes that the relief Jenkins seeks is not available under the IDEA. Defendants' argument that Jenkins' claim is actually an IDEA action is, therefore, unpersuasive.[7]

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[7] In further support of their position that Jenkins cannot pursue her § 1983 claim because her claim is properly one under the IDEA, Defendants filed as additional authority the decision of *Long v. Dawson Springs Independent School District*, No. 05-5535, 2006 U.S. App. LEXIS 22196 (6th Cir. Aug. 25, 2006). (Doc. 29.) In *Long*, the plaintiff brought an IDEA claim and a separate § 1983 claim seeking money damages for the defendant's alleged violation of the IDEA. The Sixth Circuit Court of Appeals held that a plaintiff may not seek money damages for violations of the IDEA under § 1983. *Id.* at * 16. *Long* is not instructive on the issues presented in this case because Jenkins' § 1983 claim is not based on Defendants' violation of the IDEA but ostensibly for Defendants' alleged violation of First Amendment free speech and privacy rights.

B. 42 U.S.C. § 1983 and Municipal Liability

Jenkins asserts two separate claims under 42 U.S.C. § 1983: retaliation for her exercise of her First Amendment rights, and violation of her and her daughter's First Amendment right to privacy.[8] Defendants urge the Court to dismiss Jenkins' retaliation claim on grounds that Jenkins and her daughter never engaged in any constitutionally protected activity, namely, that the subject of Jenkins' "speech" was not of public concern and thus not within the protection of the First Amendment. Defendants

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[8] The precise nature of Jenkins' § 1983 claim is difficult, if not impossible, to discern from the Complaint itself. Jenkins captions her first claim, "42 U.S.C. § 1983: First Amendment Privacy Violation." However, Paragraph 19 states that the claim is brought "pursuant to 42 U.S.C. § 1983 to vindicate rights guaranteed Plaintiff and her minor daughter under the First Amendment to the Constitution of the United States and the penumbra of familial rights recognized by the Supreme Court of the Unites [sic] States; through the Fourteenth Amendment to the Constitution of the United States; and the laws of the United States guaranteeing equal access to public education by persons with disabilities." To confuse the issue further, the following paragraph states, "Defendant's actions, in retaliating under color of law against Plaintiff because of her public complaints, violated Plaintiff's and the minor's First Amendment rights to free expression and privacy." It is only through Plaintiff's memorandum in opposition to Defendants' Motion for Summary Judgment that the nature of the claim becomes apparent. Jenkins alleges that Defendants retaliated against her for her exercise of her First Amendment right to free speech (*see* doc. 20 at 14-18) and that Defendants violated her and her daughter's "informational right to privacy" (*see id.* at 18-20).

urge the Court to dismiss Jenkins' privacy claim on grounds that she has not identified any privacy right that was violated by the Defendants. Additionally, Defendants argue that the Board cannot be held liable in a § 1983 action under a theory of municipal liability because Jenkins cannot establish that the alleged deprivation of Jenkins' and her daughter's constitutional rights was caused by an official policy or custom of the school district. (Doc. 19 at 11.)

Section 1983 is not itself a source of substantive rights but provides "a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Thus, to establish a claim under § 1983, a plaintiff must "identify a right secured by the United States Constitution and deprivation of that right by a person acting under color of state law." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). As a general rule, public officials acting within the scope of their official duties are shielded from civil liability by the qualified immunity doctrine. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The doctrine protects officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* Courts apply a twostep analysis in determining whether a public official facing liability for civil damages is immune from suit. *Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996). First, the court must determine whether the defendant violated a clearly established constitutional right. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Russo*, 953 F.2d at 1042. Second, the court must

determine whether the plaintiff has alleged sufficient facts supported by sufficient evidence to indicate what the officer allegedly did was objectively unreasonable in light of the clearly established constitutional rights. *Dickerson*, 101 F.3d at 1158.

Respondeat superior is not available as a theory of recovery under § 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). Therefore, a court must examine a municipal liability claim against a school board by applying a two-pronged inquiry: "(1) Whether the plaintiff has asserted the deprivation of a constitutional right at all; and (2) Whether the ... [s]chool [b]oard is responsible for that violation." *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 505-06 (6th Cir. 1996). For liability to attach, both questions must be answered in the affirmative. *Id.* at 506. The threshold question, then, is whether Jenkins has asserted the deprivation of a clearly established constitutional right. The Court finds that she has not.

1. Retaliation for Exercising the First Amendment Right to Free Speech

The three elements of a retaliation claim are: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights. *Mattox v. City of Forest Park*, 183 F.3d 515, 520 (6th Cir. 1999) (citing *Bloch v. Ribar*, 156 F.3d 673,

678 (6th Cir. 1998)). To be considered constitutionally protected, speech must touch upon a matter of public concern. *Connick v. Myers*, 461 U.S. 138 (1983). Whether speech addresses a matter of public concern is determined by the content, form, and context of a given statement. *Id.* at 147-48.

Jenkins argues that the *Connick* standard requiring protected speech to address matters of public concern applies only to First Amendment retaliation claims brought by public employees. (Doc. 20 at 15.) The Court does not agree that the application of the *Connick* standard is so limited, and Jenkins directs the Court to no authority that so holds. To the contrary, courts considering First Amendment retaliation claims brought by parents of school-age children hold that for speech to be protected, it must involve matters of public concern. *See, e.g., Landstrom v. Illinois Dept. of Children and Family Servs.*, 892 F.2d 670 (7th Cir. 1990) (analogizing to the public employment context and holding that parents' speech involving purely personal complaints about the school's treatment of their daughter could not support a First Amendment claim); *Clark v. West Contra Costa Unified Sch. Dist.*, No. C-98-4884, 2000 WL 336382 (N.D. Cal. March 15, 2000) (same); *Rodgers v. Duncanville Indep. Sch. Dist.*, No. 3-04-CV-0365, 2005 WL 770712 (N.D. Tex. April 5, 2005) (same); *Mnyofu v. Bd. of Educ. of Rich Township High Sch. Dist. 227*, No. 03-C-8717, 2005 WL 2978735 (N.D. Ill. Nov. 1, 2005) (same). Thus, to fall within the protection of the First Amendment, Jenkins' expression must touch upon a public concern, "a requirement satisfied if the speech can fairly be said to relate to a matter of political, social, or other concern

of the community, rather than merely a personal grievance." *Mnyofu*, 2005 WL 2978735 at *5.

The expression that Jenkins alleges warrants constitutional protection consists of her complaints to others (Jenkins dep. vol. III, 187) and the letter she wrote to the editor of *The Ironton Tribune* concerning her dissatisfaction with the way Rock Hill was treating Shanell. The letter read as follows:

> To the editor:
>
> I have a 7-year-old daughter who is diabetic and has attended Rock Hill No. 2 school for three years. I received a phone call from the superintendent Nov. 27 and was told I couldn't bring my daughter back to school. I was told she wasn't enrolled there anymore.
>
> The school took it upon themselves to withdraw her without my permission and said that I was the one who withdrew her. We tried going to the school and got escorted out by a teacher. I made contacts with the state and got her back in school after she missed seven days.
>
> Now, we are being treated differently, just because I'm fighting for my daughter's rights. There's only one teacher in the school willing to take responsibility for my daughter's health issues. This goes to show you how much "teachers" care about your children.

(Jenkins aff. ¶ 48, Ex. A.) *The Tribune* published Jenkins' letter on Thursday, December 13, 2001.

Jenkins alleges that in retaliation for her writing this letter, Superintendent Evans called the Lawrence

County Department of Job and Family Services on December 19 and made a false report that Jenkins had neglected Shanell's health and welfare. (Doc. 1 ¶ 16; Jenkins aff. ¶ 54.) Evans denies making a complaint to Family Services. (Evans dep. vol. III, 39.) Nonetheless, even assuming that Evans did lodge the complaint that spurred Family Services to investigate Jenkins, the Court cannot conclude that Jenkins has stated a constitutional violation. Even though Jenkins' comments were made to others and her letter was publically disseminated by means of the local newspaper, her comments concerned her daughter's specific situation and did not implicate the Defendants' conduct with respect to anyone else. Jenkins testified that she wrote the letter because she "felt that the public should know what was going on with [her] daughter" and that she did not write the letter to address the situation of other students. (Jenkins dep. vol. III, 9-11.) Because Jenkins' comments fail as a matter of law to relate to a matter of public concern, her First Amendment retaliation claim must fail. Furthermore, the Complaint does not allege and there is no evidence to support a claim that Shanell engaged in or attempted to engage in any protected speech. Accordingly, the Court GRANTS Defendants' motion for summary judgment on Jenkins' First Amendment retaliation claim.

2. Right to Privacy

Jenkins asserts that the Defendants violated her and Shanell's privacy when Nurse Wagner asked Shanell what she was eating at home and when someone at the school called and made an anonymous report to Family Services. (Jenkins dep. vol. II, 45;

Jenkins dep. vol. III, 191.) Jenkins also vaguely asserts that her privacy was violated because she and her daughter "were on display. I mean we were the talk of the town. I mean everywhere we went people knew who we were." (Jenkins dep. vol. III, 193.) In her memorandum in opposition to Defendants' motion to dismiss, Jenkins broadens the scope of her claim, arguing that the "Claim [of First Amendment Privacy Violation] implicates two distinct but intersecting privacy rights. A parent's right to the orderly rearing and education of her children is afforded constitutional protection [by the Fourteenth Amendment].... Further, every person enjoys an 'informational right to privacy.'..." (Doc. 20 at 18.)

Jenkins alleges that the conduct of the Defendants impaired her right to the orderly rearing and education of Shanell because "from October, 2001 through May, 2002, the child received almost no education, solely as a result of the obstacles thrown in their way by and at the direction of Evans." (Doc. 20 at 19.) Shanell missed seven days of school in late November early December 2001 and then missed three months of school from January 2002 until the end of the school year. Even taking as true Jenkins' assertions that Superintendent Evans did not permit Shanell's attendance during the seven missed school days and then did not consistently provide Shanell with an in-home tutor for the last three months of the school year,[9] Jenkins directs this Court to no authority

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[9] In fact, Superintendent Evans was not responsible for assigning a tutor and overseeing home instruction. Rather, such duties

that holds that such actions violate a clearly established constitutional right. In fact, Jenkins cites no authority whatsoever on the contours of "a parent's right to the orderly rearing and education of her children."

Furthermore, it is undisputed that Shanell's physician recommended home schooling for Shanell beginning in January 2002. The tutor assigned to Shanell indicated in a letter to Superintendent Evans that she was having difficulties setting up times to meet with Shanell and that when she did set up an appointment, Shanell would not be there. (Evans dep. vol. II, 75.) Perhaps Defendants should have done more to find a replacement tutor to assist Shanell in her home studies. However, Jenkins cites no authority to indicate that the school's inability to provide an in-home tutor constitutes a violation of a parent's constitutional right to the orderly rearing and education of her child.

Similarly, the record cannot sustain a finding that the Defendants violated Jenkins' or her daughter's informational right to privacy.[10] The Supreme Court has recognized the right of citizens to control the

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belonged to Fred Evans, Rock Hill Elementary School Principal, who is not a party to this lawsuit. (Lloyd Evans dep. vol. II, 70.)

[10] The Court is compelled to note that the United States Supreme Court expressed the opinion that the "right of privacy" is founded in the *Fourteenth* Amendment's concept of personal liberty. *Roe v. Wade*, 410 U.S. 113, 152 (1973); *see also Flaskamp*, 385 F.3d at 944-45. Jenkins does not explain why she asserts her right to privacy claim under the First Amendment.

dissemination of sensitive information about one's self. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The Sixth Circuit has narrowly construed *Whalen* to "extend the right to informational privacy only to interests that implicate a fundamental liberty interest." *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998). In assessing these claims, courts must apply a two-part test: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 945 (6th Cir. 2004).

Jenkins' claim cannot satisfy either prong of this analysis. First, Jenkins cites absolutely no authority for the proposition that a parent has a fundamental liberty interest in information pertaining to her management of her child's diabetes. Second, Jenkins has no evidence that Defendants ever revealed Shanell's medical records to anyone. (Jenkins dep. vol. III, 194.)

In short, absent authority holding that actions like those allegedly taken by Superintendent Evans violate a clearly established constitutional right, the Court must conclude that Evans is shielded from liability by the qualified immunity doctrine. Because Jenkins has not asserted the deprivation of any constitutional right, the Court need not inquire into whether Superintendent Evans' actions were objectively unreasonable or whether the School Board is responsible for the alleged violations.

IV. PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' REPLY MEMORANDUM

In their Reply Memorandum in Support of Their Motion for Summary Judgment (doc. 21), Defendants argue that Jenkins improperly relied on her affidavit, filed contemporaneously with her memorandum in opposition to Defendants' motion, to create a genuine issue of material fact. Specifically, Defendants point out that Jenkins was deposed four times from December 2004 through April 2005 yet relied almost exclusively on her affidavit to support her opposing memorandum. (*Id.* at 2.) Primarily at issue is Jenkins' affidavit testimony that Superintendent Evans told her that he was the one who called Family Services to report Jenkins' alleged medical neglect of Shanell. (*Id.* at 3.) Defendants also object to the fact that Jenkins supported her opposition memorandum with the affidavits of parties in unrelated litigation.

Jenkins moved to strike Defendants' reply memorandum asserting that it contained "false statements of material fact." Upon review of Jenkins' motion, the Court agrees with Jenkins that Defendants overstate certain discrepancies between Jenkins' deposition testimony and her affidavit. For example, Defendants are incorrect that Jenkins' first mention of Superintendent Evans' alleged admission that he called Family Services was in her affidavit. In fact, Jenkins recorded this alleged statement by Evans in her personal notes, copies of which were available to the Defendants *during* Jenkins' deposition testimony. (Jenkins dep. vol. II, Ex. B.) Despite Defendants' overstatements, the Court is not compelled to strike the reply as Plaintiff's motion has sufficiently clarified

the facts. Furthermore, the Court has construed all the evidence in favor of Jenkins, the non-moving party, as it must do in deciding a motion for summary judgment. In so doing, the Court assumed for the purposes of the motion that Evans did contact Family Services as Jenkins alleges. Regardless, even assuming that Evans contacted Family Services, the Court has concluded that Defendants are entitled to judgment as a matter of law. Accordingly, Plaintiff's Motion to Strike is DENIED.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment (doc. 19) and **DENIES** Plaintiff's Motion to Strike Defendants' Reply Memorandum (doc. 22).

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case Number: 1:04cv180

[Filed November 21, 2006]

SHARA JENKINS, et al,	)
	)
Plaintiff(s)	)
	)
vs.	)
	)
District Judge Susan J. Dlott	)
ROCK HILL LOCAL SCHOOL DISTRICT,	)
Board of Education, et al,	)
	)
Defendant(s)	)
	)

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . that the Court GRANTS Defendants' Motion for Summary Judgment (doc.#19) and DENIES Plaintiff's motion to strike Defendant's reply memorandum (doc.#22).

11/21/06

JAMES BONINI, CLERK
s/William Miller
Deputy Clerk

Pursuant to S. D. Ohio Civ. R. 79.2(a) and (b), all models, diagrams, depositions, photographs, x-rays and other exhibits and materials filed or offered in evidence shall be withdrawn by counsel without further Order within six (6) months after final termination of the action. All materials not withdrawn shall be disposed of by the Clerk as waste.